No. 92-1539

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

TERRY HASENSTAB,

Petitioner,

- against -

ROBERT J. MCGUIRE, AS POLICE COMMISSIONER OF THE CITY OF NEW YORK, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

O. PETER SHERWOOD,
Corporation Counsel for the
City of New York,
Attorney for Respondents,
100 Church Street,
New York, N.Y. 10007.
(212) 788-1023 or 1064

LEONARD J. KOERNER,*
FAY LEOUSSIS,
DEBORAH R. DOUGLAS,
of Counsel.

*Attorney of Record
April 2, 1993

QUESTION PRESENTED

Given that the relief requested is barred by the controlling New York precedent in Deas v. Levitt, 73 NY2d 525, 541 N.Y.S.2d 958, 539 N.E.2d 1086, that no constitutional claims were raised in the Article 78 petition, and that petitioner's subsequent claims have no merit, was the Article 78 petition properly dismissed?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	A1
TABLE OF AUTHORITIES	i
STATEMENT OF THE CASE	2
OPINIONS BELOW	8
(a) New York Supreme Court	8
(b) The New York Appellate Division, First Department	9
(c) New York Court of Appeals	14

Page

REASONS FOR DENYING THE WRIT OF CERTIORARI

THERE IS SIMPLY NO ISSUE OF LAW WARRANTING THIS COURT'S REVIEW BECAUSE PETITIONER FAILED TO RAISE ANY CONSTITUTIONAL CLAIMS IN HIS ARTICLE 78 PETITION AND BECAUSE HIS SUBSEQUENT BELATED CLAIMS IN ANY EVENT, ARE MERITLESS. MOREOVER, THE RELIEF REQUESTED IS BARRED BY CONTROLLING NEW YORK PRECEDENT IN DEAS v. LEVITT, 73 NY2d 525, 541 N.Y.S.2D 958, 539 N.E.2d 1086 15

CONCLUSION 24

TABLE OF AUTHORITIES

A. CASES **Page**

Deas v. Levitt, 73 NY2d 525, 541 N.Y.S. 2d 958, 539 N.E.2d 1086, cert, denied, 493 U.S. 933, 110 S.Ct. 324, 107 L.Ed2d 314 (1989) 7, 8 14, 15

Canfora v. Board of Trustees, 60 NY2d 347, 469 N.Y.S.2d 635, 457 N.E.2d 740 (1983) 19

Polce v. McGuire, 61 NY2d 663, 472 N.Y.S.2d 86, 460 N.E.2d 227 (1983) 19

Mondello v. Beekman, 56 NY2d 513 (1982), 449 N.Y.S.2d 963, 434 N.E.2d 1341, aff'g for the reasons stated at 78 AD2d 824, 433 N.Y.S.2d 439 (1st Dept., 1980) 19

B. NEW YORK STATE CONSTITUTION

Article V, § 6 8

Page

C. STATUTES

Civil Service Law:

section 50(4) 12, 16, 17, 20

section 50(9) 21

section 61 16

New York City Administrative Code:

section 13-206(d) 19-20

section 13-252 21

New York City Charter:

section 812(d) 17

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

In the Matter of the Application of

TERRY HASENSTAB,

Petitioner,

For a Judgment Under Article 78 of the Civil Practice Law and Rules

- against -

ROBERT J. MCGUIRE, AS POLICE COMMISSIONER OF THE CITY OF NEW YORK, AND AS CHAIRMAN OF THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND, ARTICLE II, THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND, ARTICLE II, NEW YORK CITY POLICE DEPARTMENT AND THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

STATEMENT OF THE CASE

(a)

In this Article 78 proceeding, a former police officer who retired from the New York City Police Department on accident disability, challenges the order of the New York State Court of Appeals, entered June 11, 1992, which unanimously affirmed the order, entered December 12, 1991, of the Appellate Division, First Department, for the reasons stated by the Appellate Division. The Appellate Division, with a two-justice dissent, affirmed the judgment of the Supreme Court, Bronx County (Mazur, J.), entered September 7, 1990. The Supreme Court dismissed (1) the Article 78 petition brought after petitioner's medical retirement seeking to compel respondents to retroactively appoint him to the rank of sergeant and to recompute his

retirement pension to reflect that promotion, and (2) petitioner's motion to hold respondents in contempt of court.

Petitioner now seeks review by this Court primarily on equal protection and due process grounds which he never raised in his Article 78 petition.[1]

(b)

In 1978, petitioner, a police officer since 1964, took a civil service examination for promotion to the rank of sergeant (14). In July 1980, respondents notified petitioner that he failed that examination ("Exam 8539") (18, 14). Over two years later in August 1982, petitioner applied for accident disability retirement based upon two separate line-

---

[1] The U.S. District Court for the Southern District of New York dismissed petitioner's action brought pursuant to 42 U.S.C. §1983 on grounds of, inter alia, petitioner's failure to raise any constitutional claims in his Article 78 petition (246, 254, 257-58). Unless otherwise indicated, numbers in parentheses refer to pages in the Record on Appeal filed in the New York Court of Appeals.

of-duty injuries sustained on July 16, 1981 and May 5, 1982 (52-56, 42-44, 47-51, 31, 148). Petitioner checked the following block on his application: "I hereby claim that I am disabled and that this disability is the natural and proximate result of an accidental injury sustained in the performance of City service as a police officer" (53). In September 1982, the Police Commissioner also filed an application directing the Medical Board of the Police Pension Fund ("the Medical Board") to determine petitioner's fitness for duty (45, 58).

Petitioner was out sick at full pay from May 5, 1982 to the time he subsequently retired (131). After initially deferring its recommendation pending additional doctors' reports, the Medical Board, in February 1983, issued a determination recommending that petitioner's application be denied (33-34). However, petitioner thereafter submitted additional medical proof to the

Commanding Officer of the Pension Section who, in turn, requested that the Medical Board re-evaluate petitioner's application in light of the new medical evidence (60, 34). After another medical examination, the Medical Board concluded that petitioner, indeed, had sustained a "permanent and partial disability" and, on June 7, 1983, recommended approval of petitioner's application (61-62, 34).

Thereafter, on or about July 6, 1983, respondents were ordered to rescore Exam 8539 to allow alternative responses to four questions pursuant to a successful CPLR Article 78 challenge by a group of police officers, not including petitioner (19-28). That examination was rerated on July 20, 1983, and as a result, a new list of those who passed, which included petitioner's name, was drafted (34). Prior to the promulgation of the revised

eligibility list on September 9, 1983, the New York City Department of Personnel informed respondents of the results "so that the promotion process could begin as soon as possible" (34-35).

Sometime after July 20, 1983, but before August 22, 1983, respondents in turn notified those persons selected for promotion to report to a basic management orientation course on August 22, 1983, one day before the Board of Trustees of the Police Pension Fund ("the Board of Trustees") approved petitioner's retirement application (35, 15). Officers selected by the Police Commissioner were promoted to sergeant on September 12, 1983 (35).

Meanwhile, the Board of Trustees approved petitioner's accident disability retirement on August 23, 1983 (15). Petitioner, on full-salaried sick leave since May 5, 1982, waived 105 days of terminal leave and retired from

the Police Department on August 31, 1983 (63, 15). On or about September 9, 1983, respondents published the revised eligibility list containing the names, including petitioner, of those officers who had passed the rerated examination, and, on September 15, 1983, notified petitioner in writing that he had passed (65-82, 29).

On or about January 12, 1984, petitioner commenced this Article 78 proceeding seeking an order to compel respondents to retroactively appoint him to the rank of sergeant and to recompute his retirement pension in accordance with that promotion (16, 11-16). The New York Supreme Court (Mazur, J.) denied the relief sought and this appeal ensued.

OPINIONS BELOW

(a)

New York Supreme Court

In dismissing the Article 78 proceeding, together with the contempt motion, the Supreme Court, by order entered September 7, 1990, held that petitioner, as mandated by Deas v. Levitt, 73 NY2d 525, 541 N.Y.S.2d 958, 539 N.E.2d 1086, cert. denied, 493 U.S. 933, 110 S.Ct. 324, 107 L.Ed 2d 314 (1989), did not challenge the validity of the eligibility list itself "as being in derogation of constitutional merit and fitness requirements", but merely alleged that he had been "wrongly ruled ineligible" (362-64). Accordingly, the Court noted that Deas "clearly held that there is no constitutional prohibition against distinguishing between these classes of applicants" (363).

(b)

The New York Appellate Division, First Department

Issues upon which the Appellate Division's Majority and Dissent Agreed

Both the Appellate Division's majority and dissent agreed that the New York Court of Appeals' controlling precedent in Deas v. Levitt, 73 NY2d 525, 541 N.Y.S.2d 958, 539 N.E.2d 1086, cert. denied, 493 U.S. 933, 110 S.Ct. 324, 107 L.Ed 2d 314 (1989), bars petitioner from asserting his claim to a retroactive promotion to the rank of sergeant because his alleged basis for relief has nothing to do with the validity of the eligibility list itself. The Court of Appeals held in Deas that "it is not sufficient to attack either the validity of the eligible list itself" as a derogation of the merit and fitness requirements of the New York State Constitution (Art. V, §6) "or commence a proceeding before the list has expired" -- an applicant must

do both. 73 NY2d at 531. The Court of Appeals further held in Deas that there is no due process or other constitutional prohibition against distinguishing between applicants "who have attacked the validity of the list and those who have only alleged they have been wrongly ruled ineligible for medical or similar reasons", the latter of which does not give the applicant any cause of action. 73 NY2d at 534.

The majority and dissent also agreed that there is no evidence that respondents have ever promoted any person after the Medical Board has recommended approval of such person's application for accident disability retirement.

The Majority

The Appellate Division's majority found that the Police Department did not act arbitrarily, capriciously or in

bad faith when it did not order petitioner, who was out on sick leave for fifteen months and was about to be medically retired, to attend the basic orientation management course. The majority noted that the Medical Board, on June 7, 1983 -- more than a month before the examination was rerated -- had already determined that petitioner was medically unfit to continue to serve as a police officer and recommended to the Board of Trustees that his application for accident disability retirement be approved.

The majority concluded that Civil Service Law §50(4), which provides that applicants or eligibles be given written reasons for their disqualification so that they may "submit facts in opposition to such disqualification", is inapplicable to this case. The majority found, contrary to the dissent's view, that the Police Department's selection of officers to attend the basic management training course in

August 1983 "so that the promotion process could begin as soon as possible" was not the legal equivalent of the promulgation of the official list. The majority pointed out that the revised eligibility list was not published until September 9, 1983 and, moreover, that no one was promoted to sergeant from the revised eligibility list until September 12, 1983, dates after which petitioner had retired. The majority also noted that, in any event, the dissent offered no legal authority requiring respondents to notify applicants of disqualification prior to the promulgation of the official list.

The Dissent

The dissent conceded that petitioner "cannot be promoted to sergeant even on a finding that the Department's treatment of him was arbitrary and capricious", but nevertheless opined that petitioner may be entitled to a

damage award "commensurate with his lost benefits" on due process grounds as if he were promoted to sergeant.

The dissent believed that petitioner was denied procedural due process because respondents published the revised eligibility list on September 9, 1983 and notified petitioner in writing that he passed rerated Exam 8539 on September 15, 1983, dates after petitioner's medical retirement on August 31, 1983. According to the dissent, petitioner, in effect, was disqualified from promotion to sergeant "when he was omitted from the group which was notified to report for the indoctrination course on August 22, 1983". Based on that belief, the dissent cited Civil Service Law §50(4) for the proposition that respondents were obligated to provide petitioner with notice of, and reasons for, disqualification to allow him the opportunity to "defer action on his retirement application and challenge his

disqualification [pursuant to New York City Charter §812(d)] on medical grounds if that, indeed, was the reason he was being denied promotion".

The dissent would have remanded this matter for a hearing "to determine whether respondents acted arbitrarily in failing to give petitioner notice of his disqualification for promotion to sergeant and whether the Department's decision to deny petitioner such promotion was arbitrary and discriminatory".

(c)

New York Court of Appeals

The Court of Appeals unanimously affirmed the order of the Appellate Division for the reasons stated in the Appellate Division's majority opinion.

REASONS FOR DENYING THE WRIT OF CERTIORARI

THERE IS SIMPLY NO ISSUE OF LAW WARRANTING THIS COURT'S REVIEW BECAUSE PETITIONER FAILED TO RAISE ANY CONSTITUTIONAL CLAIMS IN HIS ARTICLE 78 PETITION AND BECAUSE HIS SUBSEQUENT BELATED CLAIMS, IN ANY EVENT, ARE MERITLESS. MOREOVER, THE RELIEF REQUESTED IS BARRED BY CONTROLLING NEW YORK PRECEDENT IN DEAS v. LEVITT, 73 NY2d 525, 541 N.Y.S.2d 958, 539 N.E.2d 1086.

(a)

At the outset, we note that since all the Courts below held that the controlling precedent in Deas v. Levitt, 73 NY2d 525, 541 N.Y.S.2d 958, 539 N.E.2d 1086, cert. denied, 493 U.S. 933, 110 S.Ct. 324, 107 L.Ed 2d 314 (1989), bars petitioner from a retroactive promotion to the rank of sergeant, and the sole relief sought by petitioner was a retroactive promotion and recalculation of his accident

disability pension (16), there is nothing further to litigate and the petition for a writ of certiorari should be denied for that reason alone.

The Appellate Division's dissent believed that this Article 78 petition should be remanded for an evidentiary hearing to "explore" the rationality of respondents' determination not to promote petitioner and to award petitioner damages amounting to the difference between his current pension and what it would have been if calculated on a sergeant's salary. However, petitioner never alleged any constitutional violations in his petition, nor did he request damages. Moreover, petitioner cannot obtain damages pursuant to CPLR Article 78 unless incidental to the relief sought. Since the relief sought is barred by the controlling precedent in Deas v. Levitt, supra, 73 NY2d 525, there are no issues for review in this case.

(b)

In any event, petitioner has not set forth sufficient facts in the record to allow a determination as to whether petitioner was not notified to attend the Basic Training Management Course because he was pending medical retirement, or whether he was passed over for promotion as the result of his medical unfitness or some other reason, or whether respondents, in fact, exercised its "one out of three" discretion in accordance with Civil Service Law §61. Petitioner never asserted in his petition any claim based on a violation of section 50(4) of the Civil Service Law. Accordingly, respondents never submitted facts in their answer in rebuttal.

Furthermore, petitioner waived any purported claim for damages for not being promoted when he applied for accident disability because he was "disabled", an assertion

petitioner made on his August 1982 application (52-53). Petitioner actively pursued medical retirement, including asking the Medical Board to reconsider its recommendation to deny his disability retirement application, waived 105 days of terminal leave so that he could retire earlier for his own advantage, and received full salary while at home on sick leave for approximately sixteen months prior to his retirement (60, 34, 63, 15, 131).

Contrary to the dissent's belief, Civil Service Law §50(4) and New York City Charter §812(d) are not applicable to this case. The dissent asserts that if petitioner had known that he had passed the rerated examination, he could have deferred action on his retirement application and challenged his disqualification on medical grounds "if that, indeed, was the reason he was being denied promotion". That position is based upon erroneous assumptions that a

disqualification had actually taken place, that petitioner could compel the Board of Trustees to defer action on his retirement application, and that petitioner could challenge the Medical Board's determination that he was medically unfit to serve as a police officer, when plaintiff himself filed for medical disability, was out on sick leave since May 1982, and submitted ample documentation of his medical disability to the Medical Board.

As the majority correctly held, the selection of officers to attend the basic management training course prior to the official promulgation of the revised eligibility list was not the legal equivalent of disqualifying petitioner from promotion. It is irrelevant that other officers began the basic management orientation course on August 22, 1983 (coincidentally one day before the Board of Trustees approved petitioner's application). The relevant issue is

that, on June 7, 1983, upon petitioner's own application and urging, the Medical Board found that petitioner had a "permanent and partial disability", and recommended to the Board of Trustees that his application for accident disability be approved (61-62). It is well established in this State that the Board of Trustees is bound by the Medical Board's determination of unfitness, and that petitioner is unlikely to succeed in any challenge to the Medical Board. Polce v. McGuire, 61 NY2d 663, 664, 472 N.Y.S.2d 86, 460 N.E.2d 227 (1983); Canfora v. Board of Trustees, 60 NY2d 347, 351, 469 N.Y.S.2d 635, 457 N.E.2d 740 (1983); Mondello v. Beekman, 56 NY2d 513, 449 N.Y.S.2d 963, 434 N.E.2d 1341 (1982), aff'g for the reasons stated in the memorandum at 78 AD2d 824, 433 N.Y.S.2d 439 (1st Dept., 1980).

Moreover, the record is devoid of evidence that petitioner ever challenged, pursuant to Administrative Code

§13-206(d), the Medical Board's June 7, 1983 decision that he was medically unfit, a finding he vigorously supported at the time. That statute provides that "any member, within thirty days after receipt of the decision by the medical board" may request that the Medical Board's determination be reviewed by a special medical board which shall consist of one doctor of the medical board and a doctor selected and compensated by such member". On the contrary, the record shows that petitioner actively pursued medical retirement and, in fact, submitted additional medical evidence to convince the Medical Board to reassess its initial recommendation to deny petitioner's application (60, 34).

Furthermore, Civil Service Law §50(4) was not intended to apply to a situation in which the Medical Board has determined that a police officer is medically unfit for purposes of accident disability retirement pursuant to the

New York City Administrative Code §13-252. The dissent asserted that there is "nothing to suggest that the Medical Board's determination carries more weight" than that of a medical officer required to assess whether applicants or eligibles have a physical or mental disability disqualifying them from employment or promotion under Civil Service Law §50(9). However, that argument loses sight of the fact that those two statutes have different purposes and procedures which are unrelated, fails to acknowledge that a Medical Board's finding of disability is virtually conclusive, and ignores that petitioner himself admitted he was disabled on his application and vigorously sought a reconsideration when the Medical Board first denied his application.

In addition, both the Appellate Division's majority and dissent agreed that there was no evidence that respondents have ever promoted any person after the

Medical Board has recommended to the Board of Trustees that such person's application for accident disability be approved. The dissent nevertheless would remand this proceeding for a determination as to whether respondents' decision not to promote petitioner was arbitrary and discriminatory based upon its unsupported belief that "at least one other person who, at the time of his promotion, was physically disabled". The documents which petitioner submitted dehors the record at oral argument in the Appellate Division, over my objection, merely show that some officers had been promoted while on "sick leave", as the majority correctly noted.[2]

---

[2] The petition for a writ of certiorari is replete with assertions outside the Record, i.e., the physical condition of other officers and detectives who were allegedly promoted, petitioner's "unblemished" service record, as well as numerous other unsubstantiated "facts". Petitioner did the same thing in the New York State Court of Appeals, notwithstanding that Court's denial of his motion to enlarge the Record on Appeal.

In sum, the New York Court of Appeals properly affirmed the Appellate Division's order. There is simply no issue of law in this case warranting review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

O. PETER SHERWOOD,
Corporation Counsel of the
City of New York,
Attorney for Respondents.

LEONARD J. KOERNER,*
FAY LEOUSSIS,
DEBORAH R. DOUGLAS,
of Counsel.

*Attorney of Record